a party to the fraud. He will, however, be allowed his expenses in preserving the property in his possession, but these should be itemized and verified by oath and vouchers. *In Re Tatum*, 112 Fed. 50; Cf. 7 Virginia Law Register, 656.

Debts Created by Fraud—Discharge.—A debt arising from a sale and collection of the proceeds of property conditionally sold to the vendee with retention of the title until the payments were made as required by the contract is held in *Bryant* v. *Kinyon* (Mich), 53 L. R. A. 801, not to be within the provision of the Bankruptcy Act excepting from the operation of the discharge debts created by fraud while acting as an officer "or in any fiduciary capactty."

FEDERAL PRACTICE—SUITS IN FORMA PAUPERIS.—In *Reed* v. *Pennsylvania Co.* (C. C. A.), 111 Fed. 714, an important ruling (with distinct qualifications) is made, involving the construction of the Act of Congress of July 20, 1892 (27 Stat. 252), relating to suits *in forma pauperis*. That act in substance provides that "any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to a conclusion any such suit or action without being required to prepay costs or fees, or give security therefor, upon filing a sworn statement" of inability because of poverty. Section 3 requires that officers of courts shall give their services and witnesses shall attend as in other cases; while section 4 provides that the court may request any attorney of the court to represent such poor person and may dismiss any cause brought under the act if it be made to appear that the allegation of poverty is untrue or that the alleged cause of action is frivolous or malicious.

The Circuit Court of Appeals for the Sixth Circuit rules that *appellate* proceedings are within the equity of this statute and not excluded by its letter. Citing *Fuller* v. *Montague* (C. C.), 53 Fed. 206; *Brinkley* v. *R. R. Co.* (C. C.), 95 Fed. 345; *Columb* v. *Mfg. Co.* (C. C.), 76 Fed. 198; *Volk* v. *B. F. Sturtevant Co.*, 99 Fed. 932, 39 C. C. A. 346. In the case of *The Presto*, 93 Fed. 522, 35 C. C. A. 394, the court of appeals for the Fifth Circuit held *contra*, but no reported cases appear in accord with that ruling.

In the principal case it was further held that where under a State statute, the beneficiaries and real parties in interest are the widow and children of the deceased, an affidavit not alleging the poverty of the children is defective. So also where the estate of decedent is not shown to be unable to bear the expenses of litigation. As to both of these defects, leave was given to amend.

The court, however, becomes more technical upon one point—it wishes all cases, whether brought *in forma pauperis* or not, properly presented to it. We quote from the opinion of Lurton, Circuit Judge:

"The application to suspend the rule in respect to printing briefs must be denied. That is an expense usually borne by counsel primarily, and constitutes an item of expense between counsel and client. The importance of such briefs to the attainment of a proper understanding of the merits of the case justifies us in expecting that the attorney who has advised the suing out of this writ of error will not desert the cause, or decline to comply with the rule requiring a printed brief. If we are in error about this, we will appoint an attorney to conduct the suit, upon being applied to, under the power conferred by the fourth section of the act. *Whelan* v. *Railroad Co.* (C. C.), 86 Fed. 219."

FEDERAL PRACTICE—RIGHT OF COURT TO DIRECT VERDICT.—As a corollary to *Patton* v. *Southern Railway Co.*, *supra*, a portion of the opinion of the court in

Sansom v. *Southern Railway Co.* (C. C. A.), 111 Fed. 887, is most apposite. Enough has been said of the former to show the pertinency of the following:

Per Day, Circuit Judge:

"In cases where the propriety of the court's action in instructing a verdict for the defendant is in review, certain general principles are to be borne in mind. The view of the case most favorable to the plaintiff is to be taken in determining whether the case is to be submitted to a jury. In cases of alleged negligence where the facts are undisputed the question of liability is often one of fact, not of law. Except in those cases where the law has clearly defined a specific duty, the omission of which may constitute negligence, the solution of the problem depends upon whether the conduct in question is deemed to be that of one of ordinary prudence under the same or similar circumstances. Who shall determine this matter? Is it one of fact or law? A court may not set up its own standard of ordinary care, and require the party to conform to that, and permit a recovery or otherwise as it may determine the facts to show ordinary prudence, or the lack of it, in the conduct under investigation, except in cases where fair-minded men would be agreed that the facts did or did not show a want of due care. Judge Cooley concludes an elaborate discussion of the question in this way:

'If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute. On the contrary, he should say to them, 'In the judgment of the law, this conduct was negligent,' or, as the case might be, 'There is nothing in the evidence here which tends to show a want of due care.' In either case he draws the conclusion of negligence, or the want of it, as one of law.' Cooley, Torts, 670.

"This rule is in conformity with *Railroad Co.* v. *Ives*, 144 U. S. 417, 12 Sup. Ct. 679, 36 L. Ed. 485, and *Railroad Co.* v. *Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274."

The same general ruling is made in *South Penn. Oil Co.* v. *Latshaw* (C. C. A.), 111 Fed. 598, in which Goff, J., calls attention to "the utter disregard of the rules of this court and of the Supreme Court of the United States," in the preparation of the bills of exception in the case at bar. "A separate assignment of error in respect to *each part of the court's charge* alleged to be erroneous, as well as to *each instruction given*, should have been taken."

We cannot too earnestly recommend to counsel not familiar with federal *nisi prius* practice, the careful study of these cases and the authorities cited therein. See further, *Eastman* v. *Newman* (C. C. A.), 112 Fed. 122.

EXECUTOR'S DUTY TO DEFEND WILL—ATTORNEY'S FEES WHEN ESTATE INSOLVENT.—Reference was made in our January number (*ante* p. 650) to a recent decision of the Supreme Court of the District of Columbia, allowing to an executor attorney's fees paid in the unsuccessful defense of the will. The same court has since held, distinguishing that case, that such an allowance cannot be made where the estate is *insolvent*, so that the burden would fall on the creditors of the estate, to whom it is a matter of indifference whether there is a valid will or not. *Hamilton* v. *Shillington*, 30 Wash. Law Reporter, 39.

The court said in part: